Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22-187-91
MAHADEV SHANKAR J
2 AUGUST 1996

Civil Procedure *— Striking out — Residents filed application for leave to apply for certiorari to quash local authority's decision — Local authority approved developer's project close to residents' dwelling house — Leave refused — Pending appeal — Developer filed action claiming residents' application was malicious prosecution — Developer sought declaration that residents' application was abuse of process of court and injunction — Whether developer's action could be struck out — Rules of the High Court 1980 O 18 r 19(1)(a)(b)(c)(d)*

Civil Procedure *— Parties — Residents filed application for leave to apply for certiorari to quash local authority's decision — Local authority approved developer's project close to residents' dwelling house — Whether developer was rightly joined as a party*

Civil Procedure *— Pleadings — Tort of conspiracy — Whether failure to plead with great particularity all the constituent ingredients fatal*

Tort *— Malicious prosecution — Absence of particulars of malice and lack of reason or probable cause — Whether sustainable — Whether premature when the proceedings to be impugned not resolved on appeal*

The defendants were residents of dwelling houses located in close proximity to Bukit Gasing, where a substantial portion of it was designated a green belt area. In September 1990, the defendants alerted Majlis Perbandaran Petaling Jaya ('the MPPJ') to some survey work in the area which was followed by a visit from MPPJ's town planner who gave a public assurance that development projects in the area would not be approved. Similar assurances were also given by political figures. In February 1991, the defendants suspected that some large scale development was being carried out in the area, not knowing that MPPJ had already approved the project on 10 December 1990. On 28 February 1991, some of the defendants wrote to the president of MPPJ protesting against the development. There was no response. On 18 April 1991, the residents' association wrote again to the president of MPPJ asking for details, plans and documents. Again there was no reply. On 3 June 1991, the defendants applied by originating motion for leave to file an application for certiorari to quash the approval given by the MPPJ and for consequential relief. The developer was named as the second defendant. Leave was refused on the ground that it was filed out of time. The defendants appealed to the (then) Supreme Court. Meanwhile, the developer filed this action against all the defendants on 25 June 1991, claiming that: (i) the defendants had maliciously and/or without reasonable or probable cause filed the motion; (ii) the defendants with the intent to injure

conspired and agreed together to file the motion in bad faith for no other purpose than to cause irresponsible damage to the developer; (iii) the defendants had abused the court process by perverting the same for their own collateral purpose with an ulterior motive to cause damage to the developer by the bad publicity; (iv) the motion was doomed to fail being more than six months after the date of the project approval; (v) the defendants had no locus standi to sue the MPPJ; and (vi) the developer had needlessly been added as a party. The relief claimed was a declaration that the motion was an abuse of process, an injunction to prevent the defendants from continuing with the motion, general and special damages and other relief. The defendants here filed an application to strike out the developer's claim based on O 18 r 19(1)(a), (b), (c) and (d).

Held, striking out the developer's action with costs:

(1) In determining whether a statement of claim discloses a reasonable cause of action, or itself constitutes an abuse of process, the state of affairs to which the court must have regard is that which prevailed on 25 June 1991. On that day, the motion was very far from being heard. By filing this action, the developer had literally sought to pre-empt the defendants from proceeding further (see p 267C).

(2) Since no particulars were given of the malice and the lack of reasonable and probable cause, the plea of malicious prosecution should be struck out on this ground alone (see p 268D).

(3) The claim for malicious prosecution was also premature as the appeal had not concluded the fate of the motion (see p 268E–F); *Balbhaddar Singh v Badri Shah* (1926) AIR 46 ; *B Madan Mohan Singh v B Ram Sunder Singh* (1930) AIR 326 and *Taib bin Awang v Mohamed bin Abdullah & Ors* [1983] 2 MLJ 413 followed.

(4) Apart from the bare assertion of conspiracy based on the joint filing of the action no particulars of any kind were alleged against these six defendants to show they were linked to the misdemeanours alleged against the fifth defendant. Just as fraud must be pleaded with great particularity, so also all the constituent ingredients going to make up the conspiracy must be pleaded. On this ground alone, the claim for conspiracy failed (see p 269B).

(5) Although the relief sought in the motion was primarily aimed at the MPPJ with a view to getting its approval quashed, the developer was rightly joined because it was a party whose interests could be affected (see p 269C); *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 followed.

(6) To establish the tort of conspiracy to injure the developer by lawful means, it has to be pleaded that in filing the motion the predominant purpose of the defendants as conspirators was to injure the developer. Since the predominant purpose of the

defendants in filing the motion was to further and protect legitimate interests of their own, the allegation of a parallel intention of injuring the developer could not be sustained unless the defendants used unlawful means. On both counts, the allegation of conspiracy failed against all the defendants because it was not alleged that the predominant purpose of the defendants was to injure the developer nor was it alleged that unlawful means were used (see p 269E–F).

(7) A litigant who is a party to civil proceedings who claims that those proceedings are an abuse of process must take objection in those very proceedings under O 18 r 19(1)(d). The filing of a collateral action as was done in this case was itself an abuse of process which must result as happened here in its being struck out (see p 275E).

[Bahasa Malaysia summary

Defendan-defendan adalah pemastautin rumah-rumah kediaman yang terletak berhampiran dengan Bukit Gasing, di mana sebahagian besarnya dinamakan sebagai kawasan hijau. Pada bulan September 1990, defendan-defendan memberitahu Majlis Perbandaran Petaling Jaya ('MPPJ') mengenai kerja-kerja mengukur di kawasan itu diikuti dengan lawatan perancang bandar MPPJ yang memberi jaminan umum bahawa projek pembangunan di kawasan itu tidak akan diluluskan. Jaminan yang sama juga diberikan oleh tokoh-tokoh politik. Pada bulan Februari 1991, defendan-defendan mengesyaki bahawa satu pembangunan yang besar sedang dijalankan di kawasan itu, tanpa mengetahui bahawa MPPJ telahpun meluluskan projek itu pada 10 December 1990. Pada 28 Februari 1991, beberapa orang daripada defendan-defendan mengutus surat kepada presiden MPPJ membantah pembangunan itu. Tidak ada balasan yang diterima. Pada 18 April 1991, persatuan penduduk sekali lagi mengutus surat kepada presiden MPPJ meminta butir-butir, pelan-pelan dan dokumen-dokumen. Sekali lagi tiada jawapan. Pada 3 Jun 1991, defendan-defendan memohon dengan cara usul pemula untuk kebenaran bagi memfail permohonan untuk certiorari bagi membatalkan kelulusan yang diberikan oleh MPPJ dan untuk relief berbangkit. Pemaju dinamakan sebagai defendan kedua. Kebenaran ditolak atas alasan bahawa ianya difailkan di luar masa. Defendan-defendan merayu kepada (ketika itu) Mahkamah Agung. Sementara itu, pemaju memfailkan tindakan ini terhadap semua defendan pada 25 Jun 1991, mendakwa bahawa: (i) defendan-defendan telah dengan niat jahat dan/atau tanpa sebab munasabah atau barangkali memfail usul itu; (ii) defendan-defendan dengan niat untuk mencederakan berkomplot dan bersetuju bersama-sama untuk memfail usul itu dengan niat jahat tanpa tujuan lain selain untuk mengakibatkan kerugian yang tidak bertanggungjawab kepada pemaju; (iii) defendan-defendan telah menyalahgunakan proses mahkamah dengan memutarbalikkannya untuk tujuan kolateral mereka sendiri dengan

motif utama untuk menyebabkan kerugian kepada pemaju dengan publisiti yang buruk; (iv) usul itu pasti akan gagal kerana lebih daripada enam bulan selepas tarikh kelulusan projek itu; (v) defendan-defendan tidak mempunyai locus standi untuk menyaman MPPJ; dan (vi) pemaju ditambah sebagai pihak tanpa keperluan. Relief yang dituntut adalah deklarasi bahawa usul itu adalah satu penyalahgunaan proses, injunksi untuk menahan defendan-defendan daripada meneruskan usul itu, gantirugi umum dan khas dan lain-lain relief. Defendan-defendan di sini memfailkan permohonan untuk membatalkan tuntutan pemaju berdasarkan kepada A 18 k 19(1)(a), (b), (c) dan (d).

Diputuskan, membatalkan tindakan pemaju dengan kos:

(1) Dalam menentukan sama ada pernyataan tuntutan mendedahkan kausa tindakan yang munasabah, atau merupakan satu penyalahgunaan proses, keadaan-keadaan yang mesti diambilkira oleh mahkamah ialah keadaan seperti yang terdapat pada 25 Jun 1991. Pada hari tersebut, usul itu masih belum dibicarakan. Dengan memfailkan tindakan ini, pemaju mahu menggagalkan defendan-defendan daripada meneruskan selanjutnya (lihat ms 267C).

(2) Oleh kerana tiada butir-butir diberikan mengenai niat jahat dan ketiadaan sebab munasabah dan barangkali, tuntutan pendakwaan niat jahat boleh dibatalkan atas alasan ini sahaja (lihat ms 268D).

(3) Tuntutan pendakwaan niat jahat juga adalah terlalu awal kerana rayuan belum memutuskan nasib usul itu (lihat ms 268E–F); *Balbhaddar Singh v Badri Shah* (1926) AIR 46 ; *B Madan Mohan Singh v B Ram Sunder Singh* (1930) AIR 326 dan *Taib bin Awang v Mohamed bin Abdullah & Ors* [1983] 2 MLJ 413 diikut.

(4) Selain daripada penegasan komplot berdasarkan kepada pemfailan bersama tindakan, tiada butir-butir dalam bentuk apa juga dikatakan terhadap enam defendan ini untuk menunjukkan mereka terlibat dengan misdemeanur yang dikatakan terhadap defendan kelima. Sepertimana fraud perlu diplid dengan butir-butir yang jelas, begitu juga semua perkara-perkara konsistuen yang menimbulkan komplot mesti diplid. Atas alasan ini sahaja, tuntutan komplot gagal (lihat ms 269B).

(5) Walaupun relief yang dituntut di dalam usul adalah terutamanya ditujukan kepada MPPJ dengan tujuan untuk membatalkan kelulusan yang diberikan, pemaju telah dicantumkan dengan betul kerana ia adalah pihak yang mana kepentingannya mungkin terjejas (lihat ms 269C); *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 followed.

(6) Untuk mewujudkan tort komplot untuk mencederakan pemaju dengan cara yang salah di sisi undang-undang, ianya mesti diplid bahawa dalam pemfailan usul itu, tujuan utama defendan-defendan sebagai pengkomplot adalah untuk mencederakan

pemaju. Oleh kerana tujuan utama defendan-defendan dalam memfailkan usul itu adalah untuk melanjutkan dan menjaga kepentingan mereka sendiri, dakwaan tujuan selari untuk mencederakan pemaju tidak boleh diterima kecuali defendan-defendan menggunakan cara yang salah di sisi undang-undang. Pada kedua-dua tuduhan, dakwaan komplot gagal terhadap kesemua defendan kerana ia tidak mendakwa bahawa tujuan utama defendan-defendan adalah untuk mencederakan pemaju ataupun cara yang salah di sisi undang-undang telah digunakan (lihat ms 269E–F).

(7) Litigan yang merupakan pihak dalam prosiding yang menuntut bahawa prosiding itu adalah satu penyalahgunaan proses mesti mengambil bantahan dalam prosiding itu di bawah A 18 k 19(1)(d). Pemfailan tindakan kolateral seperti yang dilakukan di dalam kes ini dengan sendirinya adalah penyalahgunaan proses yang mesti berakhir dengan ianya dibatalkan seperti yang berlaku di sini (lihat ms 275E).

Notes

For a case on striking out, see 12 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3171.

For cases on parties, see 12 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2362–2498.

For cases on pleadings, see 12 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506–2772.

For cases on malicious prosecution, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 304–313.

Cases referred to

AG v Times Newspapers Ltd [1974] AC 273

B Madan Mohan Singh v B Ram Sunder Singh (1930) AIR 326

Balbhaddar Singh v Badri Shah (1926) AIR 46

Corbett v Burge [1932] 48 TLR 626

Goldsmith v Sperrings Ltd [1977] 2 All ER 566

Grainger v Hill (1938) 4 Bing NC 212

Lonrho plc v Fayed & Ors [1991] 3 All ER 303

Metall und Rohstoff AG v Donaldson Lufkin Jenrettee Inc & Anor [1989] 3 All ER 14

Near v State of Minnesota [1930] 51 SCR 625

Pemungut Hasil Tanah, Daerah Barat Daya, Penang v Kam Gin Paik & Ors [1986] 1 MLJ 362

Speed Seal Products Ltd & Anor v Paddington [1986] 1 All ER 91

Taib bin Awang v Mohamed bin Abdullah & Ors [1983] 2 MLJ 413

Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668

Wallersteiner v Moir [1974] 3 All ER 217

Legislation referred to

Rules of the High Court 1980 O 18 r 19

William Leong (*Cheang & Ariff*) for the plaintiff.

Harun Idris and *Yeoh Poh San* (*Harun Idris Yeoh & Partners*) for the first, second, third, fourth, sixth and seventh defendants.

Azlan, Derek Fernandez, Prasad Abraham and *Wendy Terang* (*Prasad Abraham & Associates*) for the fifth defendant.

Cur Adv Vult

Mahadev Shankar J: I struck this action out on the ground that the statement of claim did not disclose a reasonable cause of action, and also on the ground that it was an abuse of the process of this court. My reasons now follow.

The first three defendants have their dwelling houses in Jalan 5/60, Petaling Jaya. The next three live in Jalan 5/54. The seventh lives in Jalan 5/42. They are collectively referred to as 'the defendants'. Their houses are located in close proximity to the Bukit Gasing Ridge. A substantial portion of Bukit Gasing was designated a green belt area.

The concern of the defendants to preserve the environmental integrity of the area was well known to the Majlis Perbandaran Petaling Jaya ('the MPPJ'). In September 1990, when an unidentified developer commenced survey work in the area, they alerted the MPPJ. The town planner, James Fredericks, visited the area with some of his officers, and then gave a public assurance that development projects in the green belt area will not be approved. Similar assurances were given by the Barisan Nasional candidate Datuk Soong Siew Hoong, and the state assemblyman, Encik Teong Shyan Chuyan in October 1990 and early 1991.

Despite these assurances, sometime in February 1991, the defendants began to notice an invasion of heavy lorries carrying earth moving equipment going up the hill past their houses and coming down with loads of earth. This daily activity led them to suspect that some large scale development was being undertaken. They did not know then that the MPPJ had already approved the project on 10 December 1990.

On 28 February 1991, the first three defendants wrote a four-page letter to the president of the MPPJ reporting these activities of the developer and protesting against this proposed development. The letter is very detailed and contained a number of very serious criticisms about the environmental impact this development would have if it was permitted to continue. Seventeen other defendants who lived in the immediate vicinity also signed their names in support of this letter. The MPPJ chose not to reply to this letter.

The residents pursued the matter and were able to meet the MPPJ president, Mr Fredericks, the town planner, Mr Patrick Gan, the chief

engineer, and Encik Kamarul Baharin, the MPPJ secretary. The defendants' account of what transpired at this meeting has not been seriously contradicted by those MPPJ officials. In effect they were presented with a *fait accompli*. The president is reported to have said:

> The project is already approved and there is nothing that can be done now. You are at least luckier than the section 16 people. You must know the people behind this project. Our hands are tied.

As if these ominous words were not enough, when the president was asked why the defendants were not notified of the approval or the intention to approve, the president did not reply, nor did he identify the people behind the project who tied the hands of the MPPJ.

The first defendant specifically asked for a formal reply to their letter of 28 February 1991. No reply was forthcoming. On 18 April 1991, the Petaling Jaya Peoples' Association wrote to the president asking for the following documents and information:

(1) draft local plan (current and previous);
(2) draft structure plan (current and previous);
(3) local plan (current and previous);
(4) structure plan (current and previous);
(5) application for planning permission;
(6) approval for planning permission;
(7) letters to defendants regarding development;
(8) surveys, studies and memorandum regarding factors take into account in giving planning permission;
(9) traffic dispersal studies; and
(10) any other relevant documents

Again there was no reply. Meanwhile the 'development' continued with its daily concomitant activities. The defendants had become painfully aware that their environment was now under threat. They felt aggrieved that the MPPJ had not given them a reasonable opportunity of being heard before the project was approved. They were frustrated by the MPPJ's refusal to answer their inquiries for further information.

They therefore filed an originating motion No 21–111–1991 (the motion) on 3 June 1991 for leave to file an application for certiorari to quash the approval given, and for consequential relief, including a stay of proceedings, and for discovery of documents and so on. The motion was supported with substantial affidavits to show why the defendants were aggrieved, and the reasons for the delay in making the application, which they blamed on the MPPJ's deliberate suppression of material information. They also listed alleged transgressions of the Town and Country Planning Act 1976, and the Town Boards and Enactment as to the invalidity of the manner in which the approval had been given. The developer was named as the second respondent.

On 25 June 1991 (ie within 22 days of the motion being filed), the developer filed this action against all the defendants. In the statement of claim, it was revealed that the developer had bought the land which was the subject matter of this complaint on 22 February 1990. (The said land was made up of 124 parcels and constituted a sizeable area of Bukit Gasing.) It was also averred in the statement of claim that on 10 December 1990, the MPPJ had granted the developer planning permission to develop the said lands to a housing and condominium project. (It is a fair inference therefore that the application was made some months before and the defendants may well have wondered why, if he knew about it, Mr Fredericks had not disclosed this when he visited the area in September 1990.)

Then follows the averments which are material to the present judgment. In para 5 of the statement of claim, it was alleged that the defendants and each of them had 'maliciously and/or without reasonable or probable cause filed' the motion. In para 7, it was alleged that the seven defendants, instigated and abetted by the fifth defendant, 'wrongfully maliciously and/or without reasonable or probable cause with intent to injure, all conspired and agreed together to jointly file the action in bad faith for no other purpose than to cause irresponsible damage to the developer.'

In para 8, it was alleged that the seven defendants in wrongfully and maliciously filing the motion, had abused the court's process by perverting the same for their own collateral purpose with an ulterior motive and/or to cause damage to the developer by the bad publicity that the defendants would cause to the plaintiff in bringing the action and not to obtain judicial remedy.

In this context, particulars were appended all of which were confined to the fifth defendant alone. The effect of these particulars were that, the fifth defendant initiated the motion so as to bring pressure to bear upon the developer to employ him as a resident engineer at a monthly salary at RM10,000 per month, and to force the developer to buy the fifth defendant's property and give him a discount on two units of the developer's condominiums. Details were given of the dates and persons to whom the fifth Defendant made these threats.

It was further averred that because more than $6^1/_2$ months had elapsed between the date of the approval (10 December 1990), and the filing of the Motion (3 June 1991) the motion was doomed to fail, that the defendants had no locus standi to sue the MPPJ and the developer had needlessly been named as a party to the motion.

Then followed figures of the value of units sold, the money committed to the project, and by way of alleged special damage it was averred that as a result of the motion and the publicity given in the media to those proceedings, the developer's sales had slowed down, and the value of the unsold units was RM34.8 million, which the developer now sought to recover from the defendants.

A The relief claimed was a declaration that the motion was an abuse of process, an injunction to prevent the defendants from continuing with the motion, general and special damages and other relief. It is not clear whether these damages are being claimed for the alleged causes of action pleaded in the body of the statement of claim, or whether it was being B alleged that the facts pleaded constituted the alleged tort of 'abuse of process' and the claim was for general and special damages in respect thereof.

In determining whether a statement of claim discloses a reasonable cause of action, or itself constitutes an abuse of process, the state of affairs C to which the court must have regard is that which prevailed on the 25 June 1991. On that day, the motion was very far from being heard. By filing this Writ therefore the Developer had literally sought to pre-empt the defendants from proceeding any further.

In the event, affidavits were filed by all parties concerned and the D motion was eventually heard by a judge on 18 October 1991. In a short oral judgment, he held that, as the application for leave had not been made within six weeks of 10 December 1990 (as provided by O 53 r 1A), he should dismiss the application. He had a discretion to extend time but he did not not do so. The relevant portion of this judgment reads as follows:—

E My decision is briefly as follows:

(a) I find that the principal officers of MPPJ had not been quite responsive to the numerous public complaints in the local press by the defendants of the affected area and had also been less than candid in their dealings with the applicants. While I find that there is no legal duty on the part of MPPJ to give the public notice of any approval of any development F project in Petaling Jaya, I am nevertheless fully satisfied that the 'wall of silence' and the lack of response by relevant officers of MPPJ, especially in the early stages (ie prior to the meeting with the defendants on 13 March 1991), had contributed to the delay in the filing of these proceedings by the applicants.

G (b) However, in the whole circumstances of this case and even after taking into account the fact that MPPJ had contributed to his delay, I find that the delay was inordinate and had not been completely accounted for to the satisfaction of the court. I am satisfied that the applicants, with proper diligence and/or with good legal advice, could have expeditiously obtained, by administrative or legal means, the necessary information H regarding the project to enable them to file these proceedings within time or soon thereafter. The unhappy defendants spent too much time ventilating their dissent and complaints in the local press. Unfortunately no positive action was taken by them to officially or legally tackle the bull by the horns until time practically ran out on them.

4 I regret that I am unable to exercise my discretion to grant the extension I of time sought by the applicants in view of the inordinate delay in the circumstances of this case.

Application dismissed.

The defendants appealed to the Supreme Court against that decision. Meanwhile, after the defendants were served with the writ and statement of claim, six of the defendants jointly filed a summons in chambers to strike out the statement of claim based on all the limbs of O 18 r 19(1)(a), (b), (c) and (d). A similar application was filed separately by the fifth defendant. In the circumstances, the court was not confined to a mere perusal of the averments in the statement of claim, but could also look to the evidence (where relevant), in the numerous affidavits filed for and in support of the applications.

As I have said before, it is not clear from the statement of claim what the true character of this action is, because the relief claimed is for 'abuse of process' alone. Indeed the whole claim could have been thrown out on a technicality because para 5 of the claim avers that the motion was filed on the 3 June 1990. No such motion was filed on that date!. I propose to overlook this and assume that it was meant to read 1991.

Paragraph 5 of the claim, as it is worded, is clearly a pleading of malicious prosecution (see *Precedent 412* in Bullen & Leake (13th Ed) p 645). No particulars are given of the malice and lack of reasonable and probable cause and the plea should be struck out on this ground alone. However on the basis that this was not fatal, there was another reason why it could not get off the ground.

The claim for malicious prosecution against the defendants could not succeed because the action was manifestly premature. Dato' Harun Idris referred me to the relevant passages in JP Aggarwala's *Pleadings in India* 1 [1990] pp 128, 129 paras 103, 104 and also at p 131 and the privy council in *Balbhaddar Singh v Badri Shah* (1926) AIR 46; *B Madan Mohan Singh v B Ram Sunder Singh* (1930) AIR 326 and also *Taib bin Awang v Mohamed bin Abdullah & Ors* [1983] 2 MLJ 413. I agree that it was not open to the developer to launch a claim for malicious prosecution until the proceedings in the motion had been finally resolved. That could only be when the appeal had been concluded.

It is self-evident from the facts that the defendants would have had an arguable case on appeal. The court of first instance had a discretion to extend time and it is hard to see how the defendants could have applied within 6 weeks of 10 December 1990 (ie before 21 January 1991), when their first inkling that something was wrong was about mid February 1991. The judge himself acknowledged that the MPPJ had stone-walled the defendants in their legitimate inquiries for information. Besides, if the approval was void ab initio, the bar of limitation was not attracted: See *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362 (a Privy Council decision). The defendants had alleged this in their application. The statement aforesaid attributed to the president, (which so far as I am aware was not credibly denied) indicated that the decision-making process in granting this approval was fatally flawed because if the MPPJ was so intimidated by the people behind the project that their hands were tied, they could not be regarded as having decided the matter

at all. The president's words can only mean that the matter was decided for the MPPJ by those people.

The second complaint against these six defendants was that, they had entered into a conspiracy with the fifth defendant to file the motion. However, apart from the bare assertion of conspiracy based on the joint filing of the action, no particulars of any kind were alleged against these six defendants to show how they were linked to the misdemeanours alleged against the fifth defendant. Just as fraud must be pleaded with great particularity, so also all the constituent ingredients going to make up the conspiracy, must be pleaded. On this ground alone, the claim for conspiracy fails.

There is more to it than that. It has to be emphasised that the relief sought in the motion was primarily aimed at the MPPJ with a view to getting its approval quashed. The developer is joined in such applications because it is a party whose interests could be affected: See *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668.

Dato' Harun referred me to the definition of conspiracy in Butterworth's *Words and Phrases Legally Defined* (3rd Ed) [1988] at p 320 and 37 *Halsbury's Laws of England* (3rd Ed) p 128. Mr William Leong, counsel for the developer, referred me to *Lonrho plc v Fayed & Ors* [1991] 3 All ER 303. I think it can be fairly stated that, to established the tort of conspiracy to injure the developer by lawful means, it has to be pleaded that, in the filing of the motion, the predominant purpose of the defendants as conspirators was to injure the developer. Since the primary or predominant purpose of the defendants in filing the motion was to further and protect legitimate interests of their own, the allegation of a parallel intention of injuring the developer could not be sustained unless the defendants used unlawful means.

On both counts the allegation of conspiracy fails against all the Defendants, because it is not alleged that the *predominant* purpose of the Defendants was to injure the Developer, nor is it alleged that unlawful means were used.

Abuse of Process

This may well be the first time in Malaysia that a litigant has attempted to put forward the proposition that the malicious institution of proceedings is an abuse of process by way of a distinct tort.

Mr Prasad Abraham, counsel for the defendant, drew my attention to Bullen & Leake & Jacob's *Precedents of Pleadings* (13th Ed) p 642 on the ingredients of malicious prosecution. He also referred me to the passages on abuse of civil process which reads:

> (b) Abuse of Civil Process
>
> An action also may lie for the abuse of ordinary civil process. In respect of a tort of maliciously instituting civil proceedings, in most respects, the matters which must be proved and pleaded are fundamentally the same except as to:
>
> (b) above, for the proceedings do not need to have determined in the plaintiff's favour. Hence in an appropriate case there can be a

counterclaim for abuse of civil process within the very action complained of. (See *Grainger v Hill* (1938) 4 Bing (NC) 212 and *Speed Seal Products Ltd v Paddington* [1985] 1 WLR 1327) (though as to this see *Metal und Rostoff* below at 614H).

(e) above, for the plaintiff must prove special damage.

The leading case in *Speed Seal* (above) where the defendant in an action successfully applied for leave to amend to add a counterclaim alleging the tort of abuse of process of the court, on the basis that the plaintiff's action had been brought in bad faith with the ulterior motive of damaging the defendant's business, rather than for the protection of any legitimate interest of the plaintiff.

The existence of this tort was, however, doubted by the CA in *Metal und Rostoff v Donaldson Inc* [1989] 3 WLR 563 at pp 609–615.

He also referred me to 25 *Court Forms* (2nd Ed) (1982 issue) 295. The passage reads:

> Process of law, itself a means of righting a wrong, is also a weapon with which the unscrupulous or malicious person may inflict real injury on another. For such a wrong, the law, besides providing various other remedies for such an abuse of its criminal or civil process, will under certain conditions afford a remedy by civil action for malicious prosecution or for a malicious abuse of civil procedure. *The scope of the action is, however, severely limited by the necessity of proving damage recognized by the law.* A successful defendant in civil proceedings has usually already vindicated his reputation, and so can suffer no lasting injury, and he is sufficiently safeguarded against financial loss by the ability of the first court to award him costs: even though the expenses incurred in an action may not be fully recovered when the successful party is awarded costs, the difference is not recoverable by action since he will already have been compensated so far as the law chooses to compensate him (see *Berry v British Transport Commission* [1961] 1 QB 149; on appeal [1962] 1 QB at pp 319–333 (CA). (Emphasis mine.)

The developer's counsel cited a number of English cases and 45 *Halsbury Law of England* (4th Ed) para 1381 and note 4 which reads as follows:

> 1381 *When the action lies.* It is a tort to use legal process in its proper form in order to accomplish a purpose other than that for which it was designed and, as a result, to cause damage. The plaintiff need not prove want of reasonable and probable cause, nor need the proceedings have terminated in his favour. He must show that the defendant has used the proceedings for some improper purpose. This tort differs from malicious prosecution in that *proof of any special damage is sufficient* (*Grainger v Hill* (1838) 4 Bing NC 212. In *Corbett v Burge Warren & Ridgley Ltd* (1932) 48 TLR 626, it was said that loss of business profits was not a recoverable head of damage). (Emphasis mine).

It seems to me that some of the passages quoted from the text books requires qualification. I therefore propose to analyse the cases cited. But before I do that I want to say in the most emphatic terms that, if a litigant brings an action to protect his rights (as the defendants did in filing the motion), the use of all remedies afforded to them by the law cannot be an abuse of the court's process. Usually, the reasons why an action has been

A brought is only determined at the conclusion of the proceedings. Here the developer filed this action praying for relief which included an injunction, the effect of which was to prevent the defendants from proceeding with a motion they had filed for a relief by way of certiorari which is recognized by the law. To grant such an injunction would have been a denial of justice by the court.

B

As to what constitutes an abuse of process, it would salutary to remind ourselves that in *Grainger v Hill* (1838) 4 Bing NC 212, it was obvious that the plaintiff knew he never had a cause of action in the first place. Secondly, he proceeded with his action in order to extort a relief he was never entitled to in law. The facts of this case are set out in *Speed Seal*

C *Products Ltd v Paddington & Anor* [1986] 1 All ER 91 at p 98 from which it was apparent that the proceedings were commenced for a debt not yet due. He then extorted the defendant's ship's register and prevented the ship from sailing. Apparently (the action for the recovery of the debt had been settled before), the debtor defendant brought a separate action for

D damages and the recovery of the register. He now succeeded on the basis that the plaintiff had abused the process of the law. This case was heard before the merging of the jurisdiction of equity and common law, and the ratio of the case seems to be that it was not necessary for the earlier action to have terminated before the relief claimed could be granted.

E The passages from decision of Lord Denning MR in *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 which developer's counsel cited, came from a dissenting judgment. The reasons given by the majority, ie Scarman & Bridge LJJ are so compelling that I would echo Lord Scarman's comment (at p 582j) that, 'The logic (of Denning MR in this case) is superficially attractive but the conclusion is suspect.'

F These passages from the judgment bear repetition. Lord Scarman stated at p 583:

> Men go to law to redress a grievance. They may not know or understand the limits of the remedies provided by law—though no one suggests that the plaintiff's advisers could be said to suffer from ignorance of the law. But
>
> G equally a man, while pursuing the remedies offered by law, may negotiate, to secure by agreement with the parties sued, terms more favourable than, or different from, what he would get in the absence of agreement. Such a negotiation, undertaken by properly advised parties, each of whom may have a legitimate interest in avoiding litigation and may be prepared to concede more than the law requires of them to achieve that end, does not
>
> H necessarily mean that the plaintiff by his litigation is reaching out to secure a collateral advantage.

At pp 585–586, Lord Bridge stated:

> Counsel for the defendants relied, in support of the submissions which I have summarized in paras 1 and 2 above, on the dictum of Evershed MR in
>
> I *Re Majory* [1955] 2 All ER 65 at p 78:
>
> > 'The so-called 'rule' in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for

> the purpose for which such proceedings are properly designed and exists; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court, and, therefore, disqualified from invoking the powers of the court by proceedings he has abused.'
>
> For the purpose of Evershed MR's general rule, what is meant by 'collateral advantage'? *The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him.* Actions are settled quite properly every day on terms which a court could not itself impose on an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land, these are a few obvious examples of such proper settlements. *In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance.* On the other hand, if it can be shown that a litigant is pursing an ulterior purpose *unrelated to the subject-matter of the litigation* and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain, but there is, I think, a difficult area in between. *What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation. Can he on that ground be debarred from proceeding? I very much doubt it. But on the view I take of the facts in this case the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract.* (Emphasis mine.)

As can be seen from the report at p 569, the application to relief on the ground of 'abuse of process' was made in the action itself, inter alia, under the provisions of O 18 r 19.

In *Speed Seal Products Ltd v Paddington & Anor* [1986] 1 All AER 91, the claim of abuse of process was made by the defendant by way of a counterclaim in the same action. The decision is of little assistance because it turned entirely on whether the defendant should be given leave to amend his defence to include such a claim. The abuse of process alleged did not turn on whether the plaintiffs were seeking a collateral advantage but on whether the plaintiffs were entitled to maintain the claim at all. The defendant claimed that he was the originator of an industrial design before he went to work for the plaintiffs. The design was used in work executed for the plaintiffs whilst the defendant was in their employment. The defendant then left the plaintiffs and set up his own company. He continued to use the design on work done for his customers. The plaintiffs filed this action claiming ownership of the design and threatened action against the defendant's customers. I do not think Bullen & Leake gives the true picture on whether 'abuse of process' for a collateral purpose exists as a distinct tort.

For this I turn now to the case of *Metall und Rohstoff AG v Donaldson Lufkin Jenrettee Inc & Anor* [1989] 3 All ER 14 (also at 3 WLR 563). Mr Leong submitted that this decision has been overruled by *Lonrho plc* [1991] 3 All ER 303. But that is only correct in so far as the Court of

Appeal in *Metall* misunderstood the ambit of the law of conspiracy as enunciated by Lord Diplock. At the risk of distortion by over simplification, it seems to me that the crux of that aspect of the matter was that the predominant objective of the conspiracy had to be to injure, if the means was lawful. If the means were unlawful, it sufficed if the intention was to injure, regardless of any other mixed motives.

The point however is that as to the doubtful existence of the alleged tort of maliciously instituting civil proceedings the dicta of the court is still intact. The headnote reads at p 16:

> (4) The tort of abuse of the process of the court consisted of an abuse of the legal process to effect an object not within the scope of the process and with the predominant purpose of using the process for a purpose other than that for which it was designed with the result that the person alleging the abuse had suffered damaged. However, the adduction by a person of false evidence and the submission of a false case for the purpose of sustaining his own claim or defeating the other party's claim did not give rise to the tort of abuse of the process of the court. Accordingly, the false evidence given on behalf of the broker and the first and second defendants to enable the injunction to be lifted so that the loans could be repaid by the broker to its parent companies in breach of the undertaking did not give rise to the tort of abuse of the process of the court and the plaintiffs were not entitled to leave in respect of that tort (see p 49h, p 50a e h, p 52h and p 64g h, post); *Grainger v Hill* (1838) 4 Bing NC 212 applied.

The analysis of the cases by Slade J starts at p 49g. At pp 50 and 51 these passages appear:

> (1) On the particular facts of *Grainger v Hill* the last condition was satisfied. The process in question consisted of the swearing by the defendants of an affidavit of debt, the obtaining of a writ of capias, the sending in of two sheriff's officers with the writ to the plaintiff and the plaintiff's arrest. The purpose for which the process was originally designed was manifestly the recovery of a due debt. The purpose for which it was actually used, on the facts of that case, was the extortion of a ship's register belonging to the plaintiff to which the defendants had no right.
>
> (2) No doubt the adduction of false evidence and the submission of a false case for the purpose of sustaining or defeating a claim in legal proceedings may subject the guilty plaintiff or defendant (as the case may be) to sanctions by way of a penal order for costs or even a prosecution for perjury. In our judgment, however, it does not expose him to an action for damages in tort under the principle of *Grainger v Hill*.
>
> No authority has been cited to us which satisfies us that it does. If the use of court process is to expose a party to liability under this principle, the process must, in our judgment, have been used for a predominant purpose 'outside the ambit of the legal claim upon which the court is asked to adjudicate' (cf *Varawa v Howard Smith Co* (1911) 13 CLR 35 at 91 per Isaacs J). Relief in tort under the principle of *Grainger v Hill* is not, in our judgment, available against a party who, however dishonestly, presents a false case for the purpose of advancing or sustaining his claim or defence in civil proceedings. This may well

cause hardship to an injured party who cannot be sufficiently compensated by an appropriate order for costs. A

However if there is a gap in the law it rests on sound considerations of public policy, as does the rule of law which gives immunity to witnesses against civil actions based on the falsity of evidence given in judicial proceedings. If the position were otherwise, honest litigants might be deterred from pursuing honest claims or defences and honest witnesses might be deterred from giving evidence (cf generally *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465 at 469, [1988] Ch 229 at 235 per Scott J and the cases there cited). B

In short we agree with the judge, for much the same reason as his, that the facts relied on do not raise an arguable case that there was *an abuse of process* falling within the *Grainger v Hill* principle. C

Perhaps implicitly recognizing M&R's difficulties in this context, counsel for M&R in his reply focused particular attention on a quite different, alternative way of putting its case on this issue. He sought to rely on a tort or alleged tort having ingredients distinct and different from those constituting a *Grainger v Hill* type abuse of process, namely a tort of *malicious institution of proceedings*. Reference to the transcripts shows that this point was raised, albeit briefly, in argument both before Gatehouse J and in the opening of M&R's cross-appeal before this court. The judge, however, clearly did not appreciate that a separate tort, quite distinct from that established by *Grainger v Hill* was being relied on, since he made no reference to it in his judgment. (Emphasis mine). D E

(3) There is a well-established tort known as the tort of malicious prosecution. Its essential ingredients are conveniently set out in a passage in 45 *Halsbury Laws* (4th Ed) para 1368, which sets out the matters which have to be pleaded to establish a tort of this nature: F

> A plaintiff must expressly state in his statement of claim: (1) the previous proceedings instituted by the defendant of which he complains; (2) that in so far as they were capable of doing so they terminated in his favour; (3) that there was no reasonable and probable cause for the defendant instituting or carrying on those proceedings; (4) that the defendant was actuated by malice; and (5) that he had suffered damage. G

Paragraph 1371 suggest that an analogous action lies for bringing 'malicious civil proceedings'. The same suggestion is made in Clerk and Lindsell on *Torts* (15th Ed 1982) paras 18–38, where it is stated:

> An action lies for the abuse of ordinary civil process, which differs only from an action for malicious prosecution in that the gist of it seems to be the special damage. Malice and absence of reasonable and probable cause must be proved in the same manner in the one as in the other. Similarly, malice is a question for the jury, who may but are not bound to infer from its presence the want of reasonable and proper cause; it must be proved also that the proceedings came to a due legal end. H I

The tort referred to in *Clerk and Lindsell* para 18–38 is plainly the same as that referred to in 45 *Halsbury's Laws* (4th Ed) para 1371.

> Although we have not heard full argument on this point, we have great doubt whether any general tort of maliciously instituting civil proceedings exists. The courts have countenanced claims by a plaintiff complaining of a malicious and unjustified arrest or of malicious and unjustified institution of bankruptcy or liquidation proceedings, but the cases have not (to our knowledge) gone beyond these limited categories. There are dicta suggesting that in the case of an ordinary civil action, however maliciously and unjustifiably brought, the successful defendant has no cause of action in tort (see *Johnson v Emerson* (1871) LR 6 Exch 329 at 372 per Martin B and *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 684 per Brett MR).

This case is certainly not a *Grainger v Hill* type of situation. The defendants were not using the motion to extort some judicial relief they were not entitled to. On the contrary, in the 23 days which elapsed from the filing of the motion, the developer had drummed-up a claim that it had sustained RM34.8 million in damages from sales it had allegedly lost because of the filing of the motion and the attendant publicity. Even if it were true that such sales had failed to materialize (and this is inherently incredible), I hold on the strength of *Corbett v Burge* [1932] 48 TLR 626, that loss of business profits is not a recoverable head of damage let alone special damage of the kind required to sustain an action for abuse of process.

As a general rule, I think it safe to state that a litigant who is a party to civil proceedings who claims that those proceedings are an abuse of process, must take that objection in those very proceedings under O 18 r 19(1)(d). The filing of a collateral action as was done in this case is itself an abuse of process which must result, as happened here in its being struck out.

At the end of the day, it transpired that, what the developer was really complaining of was not the motion which had been filed, but the allegedly adverse publicity they were getting in the press. There is no evidence whatsoever that the reports which appeared in the media about the proceedings initiated by the defendants were printed, published or instigated by the Defendants. It has not been suggested that these reports were in any way inaccurate or did not represent a fair and accurate report of a judicial proceeding. This is a good place to repeat what Hughes CJ said in *Near v State of Minnesota* [1930] 51 SCR 625 at p 630 quoting from Blackstone's commentaries:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure from criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievious or illegal, he must take the consequence of his own temerity.

Defence counsel has submitted that the real object of this writ was to 'gag' the defendants by frightening them away from the courts. This situation has some parallels with *AG v Times Newspapers Ltd* [1974] AC 273, and *Wallersteiner v Moir* [1974] 3 All ER 217.

In the light of my other findings, I do not think it is necessary for me to go into the developer's motives for filing this action. Suffice to say in conclusion that I hope the award for costs against the developer in this case and a proper understanding of the law should persuade future litigants who wish to take up a plea of abuse of process that it would be in their best interests to avail themselves of the salutary provisions of O18 r 19(1) of the RHC.

Order accordingly.

Reported by Ringo KL Low